82-1227

Supreme Court, U.S.
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No.....

SUPREME COURT OF THE UNITED STATES

October Term, 1982

KENNETH FORBES, PETITIONER

versus

ROBERT C. NEWMAN, II , RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

S. MYRON KLARFELD
KLARFELD & PRESCOTT
Counsel of Record
for Petitioner
9401 Wilshire Boulevard
Suite 1120
Beverly Hills, CA 90212
Tel. No. 213-271-9200

QUESTIONS PRESENTED

1. In states which have the so-called compulsory "report-a-crime statute", do the physicians and psychotherapists who are mandated to report their patients to authorities, become agents of the state as did the court appointed physician in Estelle v. Smith, 451 U.S. 454 (1981)?

2. In states which have the so-called compulsory "report-a-crime statute" (applicable to physicians and psychotherapists), is the patient constitutionally entitled to be warned in advance by the physician or therapist, (1) that any disclosures relating to the "report-a-crime statute" will result in the patient being reported to the authorities, and (2) to a further warning that the patient may be subject to criminal and civil penalties?

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Estelle v. Smith 451 U.S 454 (1981). i,6,7

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OTHER REFERENCES

United States Constitution

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28 U.S.C. Section 1257(3). 1

Section 11166, California Penal Code. 2,3, A20

Section 11172, California Penal Code. 2,7, A21

Section 273a, California Penal Code. 4

Section 2918, California Business and Professions Code. 3

OPINIONS BELOW

The Opinion of the Court of Appeal for San Bernardino County, State of California was entered on August 16, 1982, and it held that the Petitioner was not entitled to be warned about self-incrimination. The unpublished Opinion of the Court of Appeal is set forth in the Appendix hereto. A Petition for Hearing before the California State Supreme Court was filed on September 20, 1982 and denied without opinion on October 27, 1982.

JURISDICTION

The Judgment of the Supreme Court of the State of California was dated and entered on October 27, 1982. The jurisdiction of the United States Supreme Court is invoked under the provisions of 28 U.S. C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be ... compelled, in any criminal case, to be a witness against himself....

Section 11166, California Penal Code - mandates that practitioners report their patients to authorities upon suspicion of specified criminal activities.

(Pertinent text set forth in the Appendix at page A20.)

Section 11172, California Penal Code - grants immunity to practitioners for reporting their patients and imposes criminal penalty upon practitioners who fail to so report their patients.

(Full text set forth in the Appendix at page A21.)

STATEMENT OF THIS CASE

In March, 1979, appellant, Kenneth Forbes, (hereinafter "Forbes") engaged the fiduciary and confidential services[1] of Respondent, Robert C. Newman, II, (hereinafter "Newman") as a psychological therapist and counselor. During the course of the therapy, Forbes made a certain confidential disclosure to Newman concerning an embarrassing situation which was accidentally observed by his minor daughter who inadvertently entered a closed room while Forbes, who was alone, was engaged in a private sex act. Immediately thereafter, Newman wrote a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services reporting this incident as a "vague sexual contact" with his daughter.[2] As a result

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1/California Business and Professions Code Section 2918 states: "The confidential relations and communications between psychologist and client shall be privileged as provided by Article 7 (commencing with Section 1010) of Chapter 4 of Division 8 of the Evidence Code."

2/Said report was mandated by Section 11166 of the California Penal Code which is set out in Appendix at page A20.

of the reported "vague sexual contact" Forbes was later tried and acquitted on criminal charges allegedly related to this incident.[2A/] However, his children were taken away from him by the County for a period of nine months thereafter.

On or about November 10, 1980, Forbes filed a civil complaint against Newman charging him with negligent conduct in reporting Forbes to the authorities; for failing to warn Forbes that anything said by him relating to child abuse would be reported to the authorities; and for failing to warn him that any such report could result in criminal or civil prosecution. In addition, Forbes claimed violation of his constitutional rights. Thereafter the Superior Court sustained a demurrer to the entire Complaint without leave to amend. Forbes appealed, and the Court of Appeal reversed as to the actions based on negligent reporting, but affirmed that there was no constitutional grounds requiring Newman

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2A/ California Penal Code Section 273a provides

to warn Forbes about the "report-a-crime statute".

Thereafter Forbes applied to the California State Supreme Court for review only upon that portion of the opinion of the Court of Appeal which held that Forbes was not constitutionally entitled to be warned by his therapist about the "report-a-crime statute". This application was denied without opinion on October 27, 1982.

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(Fn. 2A/ con't)
for criminal penalties ranging from a misdemeanor to jail terms up to 4 years for child abuse.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Court of Appeal for the State of California has decided an important question of federal law which is in conflict with an applicable decision of this Court.

The recent case of Estelle v. Smith 451 U.S. 454, 101 S. Ct. 1866 (1981) held that a psychotherapist, appointed by the court, became an agent of the Court and was required to warn his patient that the communications made to him might be used against him.[2B/] That holding is equally applicable to the instant case. By requiring a practitioner to report to authorities these communications which would otherwise be considered confidential, and which relate to criminal activities, the state has made the practitioner its agent for the exercise of its authority. Just as the court-appointed psychotherapist in Estelle had a duty to warn this patient, so should the therapist in the

2B/ A fact completely overlooked and omitted by the Court of Appeal.

present situation because the mandatory nature of the reporting statute has made him an arm of the prosecution by requiring him to report "suspected incidents of child abuse."[3/] In doing this, the state must grant the patient the concommitant privilege guaranteed by the Fifth Amendment against being compelled to testify against himself.

2. This is an important issue of first impression with this Court - a logical extention of Estelle - and should be settled. This issue effects not only the citizens of California, but also the citizens of many other states which have similar "report-a-crime statutes." The issue raised herein strikes at the heart of the constitutional guarantee against self-incrimation, and would seem to require the type of warning established in Miranda. Without securing this type of constitutional guarantee, any

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3/ Section 11172 of the California Penal Code is set forth in Appendix at page A 21.

citizen who seeks medical assistance for any problem which may be the subject of the so-called "report-a-crime statute" will find himself or herself at the threshold of a jail cell instead of the security of a practitioner in the healing arts.[4/] This could not have been the intention of those who drafted our Constitution.

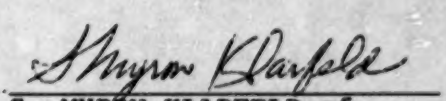
Boring its way through the center of this controversy is the policy consideration of whether it is better to maintain the confidentiality of the professional relationship so that those who need and seek help may be treated and cured, or is it better to trap the unsuspecting patient and send him off to jail?[5/]

4/ & 5/ The Court of Appeal clearly and carefully points out the seriousness of these compelling issues in its opinion on page A17 of the Appendix: "...(T)he strong public policy to protect children..." and "....the ramifications on psychological therapy if warnings are required...." Obviously, the Court of Appeal considered these policy considerations to be superior to the right against self-incrimination.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully urges this Honorable Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,



S. MYRON KLARFELD of
Klarfeld & Prescott
Counsel of Record
for Petitioner
9401 Wilshire Boulevard
Suite 1120
Beverly Hills, CA 90212
Tel. No. 213-271-9200